No. 09-660

SUPREME COURT, U.S.
JAN 6 - 2010

In The
Supreme Court of the United States

JAYRAJ NAIR,

Petitioner,

vs.

THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF PLACER,

Respondent.

and

BINDU NAIR,

Real Party In Interest.

On Petition For A Writ Of Certiorari To The Court Of Appeal of California, Third Appellate District

BRIEF IN OPPOSITION OF BINDU NAIR

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OPINIONS BELOW

The Placer County trial court entered the domestic violence restraining order on March 25, 2009. The California Court of Appeal entered the order denying the writ petition for extraordinary relief on May 28, 2009. The California Supreme Court entered the order denying the petition for review on July 8, 2009. None of the decisions was published.

JURISDICTION

The writ petition for extraordinary relief was decided by the California Court of Appeal on discretionary grounds not invoking any of the bases for jurisdiction of this Court as set forth in 28 U.S.C. section 1257 (a) or as referenced in this Court's Rule 10. The order of the California Supreme Court denying review was entered on July 8, 2009. The petition for a writ of certiorari was filed in this Court on September 9, 2009.

INTRODUCTION

This petition – labeled a request to review "a federal constitutional issue regarding due process rights" – arises out of a domestic violence restraining order in an ongoing family law matter in Placer County, California. The California Supreme Court denied review of the California Court of Appeal's

discretionary denial of a writ petition for extraordinary relief. Subsequent to filing the writ petition for extraordinary relief in the California Court of Appeal, petitioner filed an appeal of the same restraining order in the same appellate court [The pending appeal is case number C062004 in the Third District Court of Appeal]. Petitioner omits mention altogether of his pending appeal. The appeal raises the same due process arguments raised in the petition for a writ of certiorari. The state appellate court has not yet had an opportunity to decide the appeal. Briefing was complete as of November 16, 2009, and the parties await notice of oral argument and a decision on the merits. The pending appeal renders this petition for a writ of certiorari moot.

The petition to this Court fails to address the only issue, *i.e.*, whether the California appellate court improperly denied the writ petition for extraordinary relief, and why this Court should grant review of *that* issue. Instead, the petition attempts an end-run around normal appellate procedures and requests review of the case on the merits – merits which are now being reviewed by the California Court of Appeal but have not yet been decided and, therefore, are not properly before this Court. Because there are material misstatements in the petition, and out of an abundance of caution, real party in interest will briefly address the due process arguments raised in the petition. (Rules of the United States Supreme Court, Rule 15.) The state appellate courts, however,

exercised their discretion to deny petitioner extraordinary relief; they did not review or decide any federal questions in doing so. The petition for a writ of certiorari should, therefore, be denied.

STATEMENT OF THE CASE

The petition for a writ of certiorari arises out of an ongoing family law matter pending in California in the Placer County Superior Court. The petitioner, Jayraj Nair, and real party in interest, Bindu Nair, are the parents of two minor children, Suraj (born in July 1996) and Sujay (born in December 2003). In 2006, real party in interest filed a petition under California's Domestic Violence Prevention Act alleging emotional abuse of the children by petitioner. (Cal. Fam. Code §6200, et seq.) Petitioner subsequently filed a petition for dissolution, and the matters were consolidated in the trial court.

Following a bifurcated custody trial, the trial court found that petitioner had alienated the older child, Suraj, from real party in interest. On March 27, 2008, the trial court ordered, among other things, ongoing reunification therapy for Suraj and real party in interest. The order also provided for specific parenting time and holidays [The reports were submitted by petitioner as confidential Exhibit 14 to the appendix of exhibits filed in support of the writ petition for extraordinary relief and are numbered consecutively in that appendix using the designation

"AWrA."]. (AWrA 1-18.) Petitioner failed to heed the trial court's orders and, on May 15, 2008, after a hearing where both parties were present and gave testimony, the March 27, 2008 order was modified to provide for supervised-only visitation between petitioner and the younger child, Sujay. (AWrA 21-22.)

On October 1, 2008, Dr. Janelle Burrill was appointed by the court as a reunification counselor for the older child, Suraj. On February 10, 2009, the trial court issued an order to show cause and, on February 11, 2009, the trial court *sua sponte* issued a temporary restraining order ("TRO") against petitioner. (AWrA 25-71.) Petitioner incorrectly states in the petition to this Court that the February 11, 2009 TRO was an order entered after an evidentiary hearing. (Pet. 5.) The trial court actually issued the TRO *sua sponte,* based on information contained in a confidential report made to the trial court by Dr. Burrill on February 6, 2009. (AWrA 584-630.) Dr. Burrill's report contained information that petitioner had threatened to kill real party in interest and had emotionally abused and severely alienated the older child, Suraj, from real party in interest. (*Id.*)

The February 11, 2009 TRO did not cut off petitioner's visitation rights as petitioner asserts (Pet. 6); it gave real party in interest sole legal and physical custody of both children and ordered petitioner to have no contact with the older child until further order of the court and to undergo a psychiatric assessment and treatment. (AWrA 54-71.) Petitioner also misstates the basis for issuance of the

TRO as a hearing "at which [he] was not present." (Pet. 5.) The trial court issued the TRO *sua sponte,* based on information reported to the court by Dr. Burrill in a written report – not based on other pleadings or proceedings in the case as petitioner suggests. (AWrA 54-71.) Petitioner also incorrectly identifies real party in interest and the children as "restrained parties." (Pet. 5-6.) In fact, real party in interest is a *protected* person under the restraining orders, as are the children; the only restrained party is petitioner.

Petitioner was served with the order to show cause and TRO on February 20, 2009, and law enforcement personnel returned Suraj to real party in interest's custody that same day. (AWrA 54-71.) The evidentiary hearing on the domestic violence restraining order was held on March 10, 2009 and March 13, 2009. (AWrA 273-583.) Both parties testified, called and cross-examined witnesses, introduced documents, and gave closing arguments.

Petitioner misstates the substance of Dr. Burrill's reports and her trial testimony. (Pet. 7.) These misstatements materially undermine petitioner's arguments. Contrary to petitioner's assertion, Dr. Burrill gave trial testimony about *two* reports – one which *predated* any involvement by the psychiatrist, Dr. Robert Blanco, about whose failure to testify petitioner complains. (AWrA 371-372; 376-377.) Dr. Burrill's reports were admitted into evidence. (AWrA 376-377.) Dr. Burrill's February 6, 2009 report stated, "*Father presents a serious risk of physical harm to*

Mother and to minor Suraj . . . if he has contact." (AWrA 596, emphasis in original.) She also reported that "based on the behaviors displayed by Father at my office, on the telephone, and in his e-mails, he is seriously mentally disturbed . . . " (*Id.*) Dr. Burrill concluded that petitioner needed a psychiatric assessment and related treatment. (*Id.*) Dr. Burrill's confidential supplemental reunification report of February 25, 2009 noted that Suraj had been removed from "a very dangerous parent whose hatred for Mother was imparted daily to the point where killing Mother was discussed with Suraj." (AWrA 628.) The report concluded, as follows:

> Sujay reported to his therapist on December 31, 2008 that Father and Suraj had discussed killing Mother. This is violent and beyond belief until you interview the Father, and Suraj. Father is very capable of doing anything to achieve his goals; including harming anyone who gets in his way. (*Id.*)

Both of Dr. Burrill's February 2009 reports were admitted into evidence at the hearing without objection by petitioner. (AWrA 376-377.) Dr. Burrill also testified, without objection, to her expert opinion of the mental state of the child, as well as to the emotional abuse perpetrated on the child by petitioner, *prior to and separate from any involvement by Dr. Blanco* – who did not see Suraj prior to February 20, 2009. (AWrA 378-380; 386:12-389:6; 400-402.)

Petitioner subpoenaed three witnesses, including Dr. Robert Blanco. However, on March 13, 2009, prior

to the beginning of proceedings that day, petitioner reported to the court that Dr. Blanco had advised him that he did not intend to appear at the hearing because he did not have any of the documents petitioner had subpoenaed. (AWrA 486:12-23.) Petitioner complained, "I would like to get medical information from this physician," and asked "How would you (the trial court) recommend I get Dr. Robert L. Blanco's testimony this morning or this afternoon?" But petitioner never took the necessary steps to obtain Dr. Blanco's testimony – despite the court's comments that petitioner had remedies available to him and the court's admonition that it could not advise him how to proceed. (AWrA 489:25-490:12.) Instead, petitioner rested his case without the testimony of Dr. Blanco.

Petitioner also never subpoenaed then 12-year-old Suraj to testify or appear at trial. Suraj was not one of the three witnesses whom petitioner chose to subpoena to testify and Suraj was not present at the trial. Instead, petitioner requested only that the court "have him (Suraj) talk to you directly so you can hear it directly from Suraj if there is any emotional abuse . . . " There was no offer of proof. The court responded:

> I will not talk to the child. I have made a very strong policy not to talk to the children. This is not their fight. It's between the parents and regrettably it's a very bitter, acrimonious one. If I made a decision, regardless of what I rule, the child will blame himself whether it's a good decision or bad decision. I feel that's a terrible burden to

> place upon the child. Particularly one as apparent (sic) as the child is very fragile for whatever reason. (AWrA 395:10-23.)

Petitioner rested his case without the testimony of Suraj.

The trial court issued its ruling on March 13, 2009. (AWrA 572-583.) The order after hearing was filed on March 25, 2009. (AWrA 262-272; Writ Opp. 1-19.) The restraining orders are in effect until March 13, 2010; by their terms they are renewable until the children reach 18 years of age. (*Id.*) Petitioner's exhibits do not contain a complete copy of the March 25, 2009 order. Petitioner's copy omits six pages of Dr. Burrill's report that are included in the order and that recommend, among other things, psychiatric assessment and counseling for petitioner prior to any further contact with Suraj [A complete copy of the order after hearing is contained in real party in interest's Appendix filed in opposition to the writ petition in the California Court of Appeal on May 13, 2009. (Writ Opp. App. 1-19, case no. C061761.)]. The complete order is contained in the appendix submitted with real party in interest's opposition to petitioner's writ in the California Court of Appeal.

On May 4, 2009, petitioner filed a petition for extraordinary relief for a writ of mandate, in the California Court of Appeal, Third Appellate District, case no. C061761. Real party in interest filed an opposition on May 13, 2009. The California Court of Appeal denied the writ petition on May 28, 2009.

While the writ petition was pending in the California Court of Appeal, petitioner also filed a notice of appeal of the same restraining orders upon which he had sought the writ. The notice of appeal was filed on May 22, 2009. (California Court of Appeal, Third District, case no. C062004.) Briefing was complete as of November 16, 2009 in the appeal; oral argument and a decision on the merits are pending.

On June 5, 2009 – after filing the notice of appeal – petitioner filed a petition for review of the denial of the writ petition in the California Supreme Court. Real party in interest answered that petition for review on June 17, 2009; the petition for review was denied by the California Supreme Court on July 8, 2009. The petition for a writ of certiorari in this Court was filed on September 9, 2009.

ARGUMENT

A. This Court Lacks Jurisdiction Pursuant To 28 U.S.C. §1257.

Petitioner's statement of jurisdiction is incorrect. Petitioner asserts that this Court "has jurisdiction to review the California Supreme Court decision denying petitioner's petition for review because the issue on review was a federal constitutional issue regarding due process rights." He supports this jurisdictional statement by citation to 28 U.S.C. §1257. (Pet. 2.)

28 U.S.C. §1257 provides that:

> final judgments . . . rendered by the highest court of a State . . . may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed . . .

Nothing in Section 1257 provides a basis for petitioner to raise a federal constitutional due process argument from the discretionary denial of extraordinary relief by the California appellate courts, and no grounds specified in the petition satisfy the criteria for review set forth in Section 1257.

1. The Petition Does Not Raise Any Of The Grounds Set Forth In Supreme Court Rule 10.

Concepts of federalism, the necessity to avoid advisory opinions, as well as judicial economy, favor restraint when considering whether Supreme Court jurisdiction may properly be exercised. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons . . . A petition for a writ of certiorari is rarely granted when the

asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Rules of the United States Supreme Court, Rule 10.)

Petitioner asks this Court to review orders of the California appellate courts that deny discretionary extraordinary writ relief where an appeal is now pending on the merits but has not yet been decided. Such a request does not invoke the considerations set forth in Supreme Court Rule 10. Petitioner does not present "compelling reasons" for this Court to grant review; there are no unsettled questions of federal law and there is no conflict between courts of different states or between state courts and a United States court of appeals.

B. Extraordinary Relief Was Properly Denied By The California Appellate Courts.

California Code of Civil Procedure Section 904.1(a)(6) provides that an appeal may be taken from an order granting or dissolving an injunction. *Alliant Ins. Services, Inc. v. Gaddy*, 159 Cal.App.4th 1292, 1299, fn. 7 (2008). A domestic violence restraining order thus is appealable. Unlike appeals which are heard in California as a matter of statutory right, however, relief through writ review is deemed extraordinary, equitable and completely discretionary. *Omaha Indemnification Co. v. Superior Court*, 209 Cal.App.3d 1266, 1272-1273 (1989). "Extraordinary relief is supposed to be extraordinary" and is "not

available as a matter of course." *Roden v. AmerisourceBergen Corp.*, 130 Cal.App.4th 211, 213 (2005).

In *Science Applications Int'l Corp. v. Superior Court*, 39 Cal.App.4th 1095 (1995), the California Court of Appeal explained:

> [W]e address the propriety of writ review notwithstanding the existence of a clear remedy by appeal. It is well known that writ relief is deemed "extraordinary." We deny the vast majority of petitions we see and we rarely explain why. In reality, ***perhaps the most fundamental reason for denying writ relief is the case is still with the trial court and there is a good likelihood purported error will be either mooted or cured by the time of judgment***. As one court has summarized it: "[I]f it were granted at the drop of a hat, [writ review] would interfere with an orderly administration of justice at the trial and appellate levels. . . ."

(*Id.* at 1100, emphasis added.)

This case is still with the Placer County trial court and the California appellate courts had the discretion, and appropriately exercised that discretion, to deny extraordinary relief.

C. The Petition Should Be Denied As Moot; An Appeal Is Pending On The Same Issues.

The petition for a writ of certiorari should be denied as moot. This Court has held that "a case is

moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496 (1969). The only issue presented by the petition here – whether the California appellate courts properly denied a petition for extraordinary relief by writ of mandate – has no currency. Petitioner has filed an appeal on the merits which is pending in the California Court of Appeal. The case has been fully briefed and is awaiting oral argument and decision. Accordingly, the issue of whether the lower courts should have granted petitioner extraordinary relief by way of a writ of mandate is no longer alive and the petition to this Court is moot.

D. Petitioner Was Not Denied Due Process.

Petitioner contends that the trial court violated his "due process rights to be heard through witnesses" when it failed to "talk to" Suraj, and by not taking action to ensure that Dr. Blanco complied with the subpoena issued for his testimony. (Pet. 9-11.)

1. The Trial Court Properly Exercised Its Discretion To Not Talk To Suraj.

The trial court considered – and rejected – petitioner's request that the court "talk to" Suraj. This was a proper exercise of the court's discretion under state law. (AWrA 395:10-23.) California Family Code Section 3042(b) provides that a "court may preclude the calling of the child as a witness where the best

interests of the child so dictate and may provide alternative means of obtaining information regarding the child's preferences."

The trial court was presented with expert witness testimony that then 12-year-old Suraj had been alienated from his mother by his father at least since August 2006 and was emotionally disturbed. (AWrA 593-596.) At least three expert evaluators interviewed Suraj; their reports reflected Suraj's feelings as well as the evaluators' professional assessments of his emotional state (including that he was emotionally disturbed, enmeshed with his father, and alienated from his mother). (AA 199-221, 251-267, 303-308; AWrA 584-630.) Thus, the record plainly establishes that Suraj's preferences were otherwise in evidence before the trial court. In light of such evidence, the court properly exercised its discretion under Family Code Section 3042 and denied petitioner's request that emotionally-fragile Suraj talk to the court.

2. Petitioner Was Not Denied Due Process Based On Dr. Blanco's Failure To Testify.

Petitioner did not make, and thus has forfeited, the argument to the trial court that he makes now that he was denied due process because Dr. Blanco failed to appear at trial in response to a subpoena. Petitioner asserts that he raised the issue by the following: "Dr. Blanco is not here. I followed the due

process to get him to testify in terms of what the facts are." (Pet. 14.) It is beyond a stretch to construe this as sufficient to have raised a request to the trial court for any relief, much less to have raised a federal constitutional due process issue. This Court has stated that no jurisdiction for certiorari exists with respect to federal question issues not properly raised, considered, and decided in the state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); United States Supreme Court Rules, Rule 14.1(g)(i).

Petitioner had ample notice and a "full and fair opportunity to present all competent and material evidence relevant to the matter to be adjudicated." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ["The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'"]. The proper remedy for the failure of a witness to appear at trial is a motion to continue the trial. (*Jensen v. Superior Court*, 160 Cal.App.4th 266, 270-271 (2008) [subpoenaed witness's failure to appear at trial constitutes good cause for continuance]; California Rules of Court, Rule 3.1332.) Although petitioner advised the trial court that his subpoenaed witness was not going to appear, he did not file a motion to continue the trial based on Dr. Blanco's failure to appear; he merely complained about Dr. Blanco's lack of appearance and then proceeded to finish his case. Accordingly, petitioner forfeited the argument and failed to properly raise any federal constitutional due process issue in the

trial court sufficient to invoke the jurisdiction of this Court.

Petitioner also asserts that the trial court improperly permitted Dr. Burrill to present "hearsay" testimony concerning conversations with Dr. Blanco, and that the trial court improperly based its ruling on the alleged hearsay. He asserts that this constituted a denial of due process. (Pet. 12.) Petitioner waived any hearsay objection because he never raised it at trial. *People v. Cadogan*, 173 Cal.App.4th 1502, 1507 (2009); California Evidence Code §353(a) [timely, proper objection necessary to challenge admission of evidence on appeal]. Furthermore, the trial court did not base its ruling solely on Dr. Burrill's testimony regarding Dr. Blanco. To the contrary, the trial court relied on all of Dr. Burrill's testimony, her reports, the reports of other experts, other evidence and testimony of independent witnesses presented at trial, and the judicially-noticed record of previous proceedings. (AWrA 573-582.)

3. Petitioner Was Not Denied The Constitutional Right To Raise His Children.

Petitioner argues that the restraining order "eviscerates [his] right to raise his son without satisfying the constitutional requirements of such." (Pet. 17.) He concedes that the domestic violence restraining order is a temporary one-year order. His parental rights were not terminated by the State. He did not, and does not here, challenge the constitutionality of

California's Domestic Violence Protection Act in any particular respect and no federal constitutional issue was decided by the California Supreme Court when it denied discretionary review of the California Court of Appeal's denial of the writ petition for extraordinary relief.

CONCLUSION

The California appellate courts properly exercised their discretion to deny petitioner extraordinary relief. An appeal on the merits of the same issues raised in the petition to this Court is pending oral argument and decision in the California Court of Appeal. The petition for a writ of certiorari should be denied.

Dated: January 6, 2010

Respectfully submitted,

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